

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,
W.A. DREW EDMONDSON, in his
capacity as ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA,
et al.

Plaintiffs,

V.

TYSON FOODS, INC., et al.,

Defendants.

No. 05-CV-329-TCK-SAJ

TRANSCRIPT OF PROCEEDINGS

HAD ON DECEMBER 15, 2006

MOTION HEARING

BEFORE THE HONORABLE SAM A. JOYNER, Magistrate Judge

APPEARANCES:

For the Plaintiffs: Mr. Louis W. Bullock
Mr. David P. Page
Mr. Randall J. Miller
Mr. M. David Riggs
Mr. Richard T. Garren
Mr. David P. Page
Mr. Frederick Baker
Mr. Robert A. Nance
Ms. Kelly Hunter Burch
Mr. Robert D. Singletary

1 (APPEARANCES CONTINUED)

2 For the Defendants: Mr. Robert W. George
3 Mr. John H. Tucker
4 Ms. Theresa Noble Hill
5 Mr. A. Scott McDaniel
6 Mr. Robert P. Redemann
7 Mr. James W. Graves
8 Mr. D. Kenyon Williams, Jr.
9 Mr. Bruce W. Freeman
10 - - - - -

11 PROCEEDINGS

12 December 15, 2006

13 THE CLERK: This is Case Number 05-CV-329-TCK-SAJ
14 Attorney General of the State of Oklahoma, et al. vs. Tyson
15 Foods, et al. Counsel have made their appearance for the
16 record.

17 THE COURT: All right, it's good to see everyone. I
18 mean this is such a crowd it's like a family reunion. I mean,
19 also, we get together at a regular basis and enjoy each other's
20 company for short periods of time, so it's pretty much like a
21 family reunion.

22 I think Linda has told you I'm a tilted judge today,
23 I'm like the Leaning Tower of Pisa. Actually I was at the Y,
24 like a week ago, and you know, I was just doing a little
25 stretching after I had run a mile and I could feel a little
something in my back and then it's got a little worse every
today and today I just hardly could get out of bed. I'm sure
the psychological anticipation of this experience may have
contributed to it. But if I grimace, I want you to know it's

1 we're saying, that's our offer.

2 THE COURT: Uh-huh.

3 MR. PAGE: All data within the limits of this language
4 which was very carefully drawn, Your Honor. And I would like
5 to address that point which I think. Was maybe Mr. George's
6 first point.

7 Oh, the first point was, we're forcing them to
8 stipulate. No, we're not asking them to stipulate now, Your
9 Honor. And I think Mr. George has accurately and the Court
10 picked up, we're not asking them -- we're asking them to
11 stipulate, if they will, to admissibility, or raise specific
12 objections. But we're not even doing that now, Your Honor,
13 we're just going to put it, give it to them, and we're just
14 hopeful the Court keeps that in mind in the scheduling of this
15 case.

16 So, they don't have to stipulate. You know, the idea
17 about the lab, may have to take a lab tech's deposition. You
18 know, the way I looked at it, and I thought Mr. George and I
19 visited about this, is that they get the data, we're going to
20 give them lab QA/QCs, we're going to give them our QA/QCs,
21 we're going to give them a lot of data that goes associated
22 with that that shows where the data was collected, the field
23 notes, less any work product information that may talk about any
24 specialized evaluation or any directions from me on how they --
25 you know, I'm intimately involved in this process, Your Honor,

1 that's my role in the case. There's -- it's an unconditional
2 offer.

3 I know Mr. George doesn't want me to talk about work
4 product issue, but I think it all is related. When we give
5 this data --

6 THE COURT: We can talk about that in a minute.

7 MR. PAGE: Okay.

8 THE COURT: Maybe it would help to talk about what
9 you're not going to give them.

10 MR. PAGE: Okay. Let's talk about that. And you
11 know, Your Honor, I don't want to talk in too much specifics
12 because then if I talked about the type of lab or the type of
13 work we're doing then I've, of course, disclosed what we're
14 doing and the theory of our case.

15 THE COURT: Well, I thought we might get specific. I
16 mean, your submission in the privilege log is right over there
17 on the corner of the desk and it might not hurt to spend some
18 time with the specific submissions you made to the Court and
19 the items on the privilege log and see if they are included
20 within or without your offer.

21 MR. PAGE: Let us do that, Your Honor.

22 THE COURT: I guess, for example, are you going to
23 give them these beautiful aerial photographs?

24 MR. PAGE: No, Your Honor.

25 THE COURT: Okay.

1 MR. PAGE: Unless it's a State produced one. But if
2 it was being produced under the direction of counsel and the
3 experts gathering data in this case, we're not going to give
4 them photographs. We're going to give them the analytical data
5 that was selected, but we're not -- Your Honor, what I've got
6 in front of me, I think the defendants in pleading number 947,
7 docket number 947, which is their brief, on Page 6 and 7, kind
8 of listed the categories of information that we -- that I
9 categorized initially in our work product submittal in camera.

10 THE COURT: Okay. Let's see, maybe I can get to that.
11 It may be easier than the one I've got in front of me and it
12 may not. You say it's 947?

13 MR. PAGE: Yes, Your Honor. It's a motion before the
14 Court, I think. It's the supplemental brief in support of
15 defendant Cobb-Vantress, Inc.'s, first motion to compel, filed
16 on October 17th, 2006, and I'm referring specifically to Page 6
17 and then going over to Page 7.

18 THE COURT: All right. I think that's in our file
19 number three, do you think?

20 LAW CLERK: It is the one in file three.

21 THE COURT: Yeah, it's the new file number three.
22 Right? We have an administrative system that you can't get it
23 out of.

24 Okay. You say it's on Page 6 of that brief?

25 MR. PAGE: Yes, Your Honor, at the bottom.

1 THE COURT: Well, I'm so close to it on the screen
2 that I'm thinking it's easier to get there. Okay. I'm on Page
3 6. Plaintiffs now concede. I don't know. Is this the right
4 thing?

5 MR. PAGE: Yeah, it's a list of -- I think this is the
6 list of the information. I may be wrong.

7 THE COURT: Hydrology and high flow data, chain of
8 custody forms, field books --

9 MR. PAGE: Yeah, I think that's kind of the
10 information. That's our broad list of the type of data we
11 claim is work product in this case, and we still claim is work
12 product in this case, but we're are willing to have a limited
13 waiver, just a limited waiver to the stuff we're turning over
14 to them, to get the case moving along.

15 THE COURT: So this is a list of things you're willing
16 to give.

17 MR. PAGE: No, this is a list of all of our work
18 product, Your Honor, and now I can go through there and tell
19 you on each item what it is our offer includes and what our
20 offer doesn't include.

21 THE COURT: Okay. Well, you might do that. Go ahead.

22 MR. PAGE: Okay. Thank you, Your Honor.

23 The hydrology and high flow data, that's volume and
24 flow information on rivers and streams that we've collected.
25 We're going to turn that over. That's letter A.

1 THE COURT: Okay.

2 MR. PAGE: Chain of custody forms that typically goes
3 with environmental data collection sample and analysis. We're
4 going to turn that over.

5 THE COURT: Okay.

6 MR. PAGE: Number three, field books. Now, field
7 books are what the environmental expert takes into the field
8 with him or her, where they make notes about the conditions,
9 the time of the testing, any physical observations of the
10 location.

11 THE COURT: All right, it might speed this up if you
12 can just, you know, quickly tell us what --

13 MR. PAGE: Okay.

14 THE COURT: -- you're going to give.

15 MR. PAGE: We're going to give field notes redacted
16 for work product that deals with any specialized lab work that
17 will be done, any expert evaluation disclosures, or any
18 references to directions counsel has given.

19 So we will review the field notes and redact out
20 certain information that's still work product.

21 THE COURT: Okay.

22 MR. PAGE: Number 4 -- D, the laboratory reports, to
23 the extent they are reflected in the first bullet on our offer,
24 we're going to provide though those -- that information. And
25 then field notes that's the same thing, same comment as on

1 State. That kind, what I'm talking about is that kind of
2 analysis, Your Honor, where the expert would come in and say,
3 you know, I looked at all of this data and guess what, it is
4 poultry, poultry is the problem. And how do you know that?
5 Well, I've done this model. That's an example.

6 THE COURT: Okay. But where is the attorney's mental
7 opinion in that process?

8 MR. PAGE: Well, first of all, I understand how the
9 models work and I helped select the model that's used based on
10 whether it's going to pass Daubert. I also work with the
11 expert on making sure we have sufficient data. When I -- when
12 we sit down, Your Honor, Mr. Miller and I sit down and do this,
13 we sit down and with the expert and talk about what the case
14 has to be proved. That tells us what kind of information is
15 typically representative and then we make very specific
16 decisions about where we're going to take a sample, what we're
17 going to sample for, how often we have to sample it, what
18 analytes we're going to look at, because all those decisions
19 will affect whether or not that particular information will
20 ultimately be relevant and reliable.

21 THE COURT: Okay. Are you going to give them the test
22 results?

23 MR. PAGE: Yes.

24 THE COURT: And exclude your directions?

25 MR. PAGE: And the experts additional evaluation, yes.

1 We're going to give them the test results, but exclude the
2 additional evaluations. And some of those additional
3 evaluations, Your Honor, require to take that same information
4 and send it to another lab, another group of researchers to
5 look at.

6 THE COURT: Okay.

7 MR. PAGE: And that's directed by me, Your Honor.
8 That decision was made by me.

9 THE COURT: Well, I understand but...

10 MR. PAGE: Well that makes it work product, in my
11 opinion, Your Honor.

12 THE COURT: Right. I understand. Well, okay, with
13 your submission, can you tell us which of these you think they
14 would get and would not get under your offer?

15 MR. PAGE: Well, they'll get the underlying
16 information under the letter A, but the composite and how I put
17 it, how we put it together with my experts and how I'm going to
18 portray it, letter A, I don't want to give them that. I'll
19 give them the underlying information that goes into that
20 composite, but they can put it together themselves with their
21 own GIS expert or however else they are going to evaluate the
22 data. So that composite and those maps are all lawyer directed
23 work product.

24 THE COURT: Okay.

25 MR. PAGE: The field notes, we're going to give it to

1 them unless one of these experts, because I've talked to them,
2 put down David Page, Randy Miller, Lou Bullock said to do this.
3 We're going to redact that portion of it.

4 THE COURT: So they are going to get the picture of
5 truck full of chicken poop.

6 MR. PAGE: No, the field notes of poultry waste land
7 disposal.

8 THE COURT: I'm sorry, that's number C. You're right.

9 MR. PAGE: Okay. Photographs, Your Honor, that's --
10 again that's -- we made a direction, we directed -- Let me back
11 up. The field notes of land disposal and photographs of
12 poultry waste land disposal. Your Honor, we sat down with our
13 investigators and made some decisions on how we're going to go
14 about proving this case and we sent them to specific places at
15 specific times over a specific period of time. So B and C
16 really is work product. I want to be precise on that.

17 Those -- my memory those fields notes, I have in my
18 mind, I don't have it in front of me, Your Honor, but I think
19 it's basically an investigator's report. It's my private
20 investigator's report where I sent him out to do something and
21 he made some reports back to me as to what he observed and what
22 he saw and that's work product.

23 THE COURT: Okay. Right.

24 MR. PAGE: B and C. Chain of custody, D. They get
25 that, that's what they get.